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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHEILA ZIMARIK,

Petitioner,

v.

WORKERS' COMPENSATION
APPEALS BOARD and HUGHES
AIRCRAFT COMPANY, et al.,

Respondents.

No. B189065

(W.C.A.B. No. LAO 0743783)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Award annulled in part.

Hinden, Rondeau & Breslavsky and Jack Breslavsky for Petitioner.

Waters & Robinson, LLP and David N. Fuller for Respondents.

Petitioner, Sheila Zimarik, a former of employee of Hughes Aircraft Company which is now known as Raytheon Systems, has filed a writ of review petition challenging the January 9, 2006 order of the Workers' Compensation Appeals Board (the board) granting and denying her reconsideration petition. After hearing oral argument, we conclude the most judicious course is to allow the workers' compensation judge to calculate and award Labor Code section 4650 penalties. Therefore, we grant the writ of review petition in part and direct the board to order the workers' compensation judge to calculate and award Labor Code section 4650 penalties.

On October 20, 2005, the workers' compensation judge refused to impose Labor Code section 4650 penalties. The reconsideration petition contended in part the workers' compensation judge erroneously denied the Labor Code section 4650 penalties request. The employee argued the Labor Code section 4650 penalties were due because of the employer's failure to have timely paid permanent disability payments to her. In its January 9, 2006 opinion and orders granting and denying reconsideration, the board found the employer and its insurer, Liberty Mutual Insurance Company, unreasonably delayed paying the permanent disability award and directed payment of Labor Code section 5814 penalties. But the board refused to order payment of Labor Code section 4650 penalties.

The employee filed a writ of review petition raising numerous contentions. We issued a writ of review limited solely to the Labor Code section 4650 issue in part due to our concern over the correctness of the decision in *Leinon v. Fisherman's Grotto* (2004) 69 Cal.Comp.Cases 995 as it related to Labor Code section 4650 penalties. Before the board and in the writ of review petition, the employee did not challenge the correctness of the *Leinon* decision. Rather, the employee sought \$14,652.33 in Labor Code section 4650 penalties. The board filed a response which states: "Accordingly, as defendant did not pay the Award until April 20, 2004, or more than 14 days, i.e., 21 days, after it became final, pursuant to *Leinon*, which is binding precedent on all WCAB panels and WCJ's (Cal. Code Regs. tit. 8, §10341; *Gee v. Workers' Comp. Appeals Board* (2002) 96

Cal.App.4th 1418, 1425, fn. 6; see also Govt. Code, §11425.60(b)), defendant was liable for penalty under Labor Code section 4650(d). Thus, the WCAB acknowledges that it erred with respect to this issue.” (Fn. omitted.)

We accept the board’s concession of error. The Labor Code section 4650 penalty has been described by the California Supreme Court as: “a self-executing, strict liability provision”; applying only to “delays in the payment of temporary or permanent disability payments”; and containing “no requirement that the employer’s delay in providing benefits be unreasonable” (*Rhiner v. Workers’ Comp. Appeals Bd.* (1993) 4 Cal.4th 1213, 1227; see *State of California v. Workers’ Comp. Appeals Bd.* (1996) 44 Cal.App.4th 128, 139.) Upon issuance of the remittitur, the board is to modify its January 9, 2006 order to direct the workers’ compensation judge to award Labor Code section 4650 penalties.

For the first time at oral argument, counsel for the employee criticized the holding in *Leinon* and raised questions concerning possible Labor Code section 4650 penalties beyond the \$14,652.33 sought before the board in the reconsideration petition and in the writ of review petition. These issues were not raised in the reconsideration petition filed with the board nor in the writ of review petition presented to us. Typically, we need not address issues raised for the first time at oral argument. (*In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 989, fn. 7; see *Trabuco Highlands Community Assn. v. Head* (2002) 96 Cal.App.4th 1183, 1192, fn. 10.) More to the point, until oral argument, the employee litigated this case on the assumption she was entitled to the specific sum of \$14,652.33 in Labor Code section 4650 penalties. The board has conceded it erred in denying the reconsideration petition. Thus of all of our options, the most judicious is to allow the workers’ compensation process to decide this issue in the first instance which potentially can be done without reliance on *Leinon*. If *Leinon* becomes relevant to any ultimate computation of penalties, the parties may litigate those issues as appropriate.

We would recommend the board reconsider its analysis in *Leinon*. It is difficult to square *Leinon* with the self executing nature of Labor Code section 4650 penalties.

(*Rhiner v. Workers' Comp. Appeals Bd.*, *supra*, 4 Cal.4th at p. 1227; see *State of California v. Workers' Comp. Appeals Bd.*, *supra*, 44 Cal.App.4th at p. 139.)

Nonetheless, in light of the board's concession and the manner in which this case has been litigated, it is wiser to allow the Labor Code section 4650 penalty question to be fully litigated in the workers' compensation forum in the first instance.

Insofar as the January 9, 2006 order which is under review denied Labor Code section 4650 penalties, it is annulled. Pursuant to the concession of the Workers' Compensation Appeals Board, the matter is remanded for a computation of Labor Code section 4650 penalties. Petitioner, Sheila Zimarik, is to recover her costs incurred in these extraordinary writ proceedings from Hughes Aircraft Company which is now known as Raytheon Systems and its insurer Liberty Mutual Insurance Company.

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TURNER, P. J.

I concur:

ARMSTRONG, J.

MOSK, J., Concurring

I concur in the decision.

MOSK, J.